STATE OF MICHIGAN

COURT OF APPEALS

FONDA ISLAND & BRIGGS LAKE JOINT WATER AUTHORITY,

Plaintiff-Appellee,

v

GREEN OAK TOWNSHIP,

Defendant-Appellant,

and

PLEASANT VALLEY INVESTMENT and RON JONA & ASSOCIATES,

Defendants,

and

7-ELEVEN, INC, RITA FRANCES TURNER, and TURNER FAMILY ENTERPRISES, INC,

Intervening Defendants.

UNPUBLISHED
January 4, 2005

No. 248592
Livingston Circuit Court
LC No. 00-018275-AA

FONDA ISLAND & BRIGGS LAKE JOINT WATER AUTHORITY,

Plaintiff-Appellee,

v

GREEN OAK TOWNSHIP,

Defendant,

and

PLEASANT VALLEY INVESTMENT and

No. 248621
Livingston Circuit Court
LC No. 00-018275-AA

RON JONA & ASSOCIATES,

Defendants-Appellants,

and

7-ELEVEN, INC, RITA FRANCES TURNER,
and TURNER FAMILY ENTERPRISES,

Intervening Defendants.

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, defendants-appellants Pleasant Valley Investment and Ron Jona & Associates (hereinafter "property owners") and defendant-appellant Green Oak Township (hereinafter "township") appeal by leave granted the circuit court order reversing the township planning commission's grant of a special use permit. That permit was necessary for the property owners to install and use underground gasoline storage tanks to operate a 7-Eleven gas station and convenience store. Plaintiff Fonda Island Briggs Lake Joint Water Authority (hereinafter "water authority"), which opposes the permit, is a municipal corporation that operates municipal water supply wells on property approximately 750 feet from the proposed gas station property. We reverse.

I. Background Facts

On October 21, 1998, the property owners applied to the planning commission for approval of a special use permit to build a 7-Eleven gas station and convenience store on the northeast corner of the intersection of Grand River Avenue and Pleasant Valley Road in Livingston County.

On January 14, 1999, the planning commission held a public hearing to consider the permit. The planning commission did not provide written notice of the initial hearing to the water authority; however, notice was provided to adjacent landowner residents who are serviced by the water authority, some of whom are members of the water authority's board of directors. The planning commission also posted notice of the public hearing in two local newspapers. Following a discussion about the gas station, the planning commission requested the property owners to provide it with additional information before it made its decision.

On March 18, 1999, the property owners provided the planning commission with a hydrogeologic assessment report prepared by NTH Consultants, Ltd. Based on a review of site hydrogeologic data and the proposed site use, NTH determined that "if operated properly there is little potential for site activities to impact groundwater and surface water resources surrounding the facility." NTH concluded that the "potential for surface water impact is unlikely primarily because surface water receptors are not within close proximity to the site," and additionally, "the

site is curbed to control any runoff." NTH noted that "[t]he primary mode by which groundwater impacts could occur would be via leakage from [underground storage tank] systems," but that its "assessment of site activities indicate[d] that there is little potential for this type of impact due to the safety precautions taken in the [underground storage tank] construction."

On July 8, 1999, the planning commission held a second public hearing. Representatives for the water authority, which had received proper notice, attended the meeting and expressed concern regarding the proximity of the proposed gas station to its property. The planning commission tabled discussion regarding the special use permit to allow time for the property owners to contact the DEQ to determine the effects of the proposed gas station on the water authority's existing and proposed wells. The planning commission also wanted to allow additional time for the property owners to meet with the water authority to address its members' concerns. Further, the planning commission wanted the township engineer to review discrepancies with the water authority's well log information, and wanted the property owners to address the issue of runoff to surrounding wetlands.

On September 17, 1999, Walter Bolt, a project manager and hydrogeologist for Midwest Environmental Consultants, Inc., sent a letter to the planning commission on behalf of the water authority to address concerns relating to the proposed gas station near the water authority's well field. Bolt took issue with NTH's findings that there were significant deposits of low permeability clay soils ranging in depth from 17 to 30 feet, and its assertion that various well logs suggest that the clay layer is continuous. Bolt supported his contention with data taken from the water authority's well logs for one of its two operating wells, as well as its observation well, that did not indicate the presence of clay at the elevations suggested by NTH.

On September 23, 1999, the planning commission held another hearing, at which several attendants, including representatives for the water authority, voiced their concerns about the proximity of the proposed gas station to the water authority's property. Following discussion concerning the safety of the proposed gas station and the water authority's ability to install more wells on its property, the planning commission voted to approve the property owners' requested special use permit.

The water authority appealed the planning commission's grant of a special use permit to the circuit court, arguing that it had been deprived of its right to procedural due process because it had not been given notice of the initial public hearing held on January 14, 1999. The Green Oak Township zoning ordinance provides that "[u]pon receipt of the application for a special approval use permit, the Planning Commission shall hold a public hearing," and that "[a] notice of the public hearing shall be published in at least one (1) newspaper of general circulation and sent by mail or personal delivery to all persons to whom real property is assessed who are within five hundred (500) feet of the boundary of the property in question . . . ." Section 3.4.2(B). Additionally, "[t]he notice shall be given not less than five (5) nor more than fifteen (15) days before the date the application will be considered." Section 3.4.2(B).

The water authority also argued that the planning commission's grant of a special use permit violated rules 29.2109(d)(3) and (5) promulgated under the Underground Storage Tank Regulations, Part 211 of the Natural Resources and Environmental Protection Act, MCL 324.21101 *et seq*., which provide that "a person shall not install a[n] [underground storage tank]

system . . . without secondary containment . . . unless the [underground storage tank system] is more than . . . two-thousand feet from a type I community . . . drinking water well," and "if the proposed location of a[n] [underground storage tank] system presents an unacceptable risk of contamination to surface water, wetlands or an aquifer, then the department may require that the [underground storage tank] system be located or use secondary containment, or both, so as to eliminate or minimize the danger of potential contamination or may disapprove a proposed [underground storage tank] installation."

The water authority also argued that the proposed gas station was within 2,000 feet of its wells and constituted a "known major source of contamination," and that the planning commission's grant of a special use permit therefore violated Rule 325.10812 promulgated under the Michigan Safe Drinking Water Act, MCL 325.1001 *et seq*., which provides that "[w]ells serving type I . . . public water supplies shall be located a minimum distance of 2,000 feet . . . from known major sources of contamination."

Additionally, the water authority argued that until a wellhead delineation was complete, it would be impossible to determine whether the proposed gas station was within the wellhead zone of influence, thereby presenting an unacceptable risk of contamination to surface water, wetlands, or an aquifer. As explained by Bolt, the water authority's expert, a "wellhead protection area delineation" had been submitted to the DEQ for approval, to later be incorporated into a "wellhead protection program" to be managed by the water authority. The stated intent of establishing a wellhead protection area was to raise awareness of groundwater protection and to assist Brighton and Green Oak Townships in giving the area appropriate zoning consideration for land use issues.

Finally, the water authority argued that the planning commission's decision was not supported by competent, material, and substantial evidence on the whole record.

The circuit court found that the water authority was "material[ly] prejudice[d]" because it only had from the time of the second hearing (7/8/99) until the time of the third hearing (9/23/99) to prepare, whereas the property owners had been able to prepare from the time of the first hearing (1/14/99) until the time of the third hearing (9/23/99). The circuit court remanded the matter to the planning commission for further consideration, so that the water authority would have adequate notice and an opportunity to be heard, including an opportunity to present evidence before a final decision was issued. The circuit court did not address the water authority's arguments concerning alleged violations of rules promulgated under the Underground Storage Tank Regulations and the Safe Drinking Water Act. Further, the circuit court declined to address whether the planning commission's decision was supported by competent, material and substantial evidence.

On October 12, 2000, the planning commission held a public hearing at which Zora Johnson, the water authority's attorney, expressed the water authority's concern that "there are serious health and safety issues posed by putting an underground storage tank this close to [its] wells, which are less than 2,000 feet from the property," and that "allowing the underground storage tanks to go in may inhibit or prevent future expansion of [the water authority's] system, which is critical to the residents of Green Oak Township and Brighton Township." Johnson informed the planning commission that the DEQ had approved the wellhead delineation area for the water authority, and that the proposed gas station was within the wellhead protection area for

the water authority's system. Johnson explained that the purpose of the wellhead delineation program was to protect public water supply systems that rely on groundwater from contamination or potential sources of contamination. Johnson noted that underground storage tanks have been identified as "potential source[s] of contamination."

Walter Bolt, the water authority's consultant, addressed the planning commission, and reiterated his opinion that the geology surrounding the site did not include a continuous layer of clay. Bolt admitted that NTH's report to the contrary which relied on different well logs was not incorrect, but felt that it was not "entirely representative" of the area.

Bolt reported that he had conducted a contamination model to determine the effect of a spill directly entering the water authority's water supply. Bolt admitted that his model did not account for the movement of a spill from the ground to the water table, but rather a spill directly into the water table. Nevertheless, Bolt concluded that if a spill occurred at the gas station, the water authority's wells would be contaminated.

The remainder of the public hearing consisted of numerous representatives for the water authority and other residents voicing their concerns about the planning commission's approval of the special use permit. Before the hearing concluded, the chairman of the planning commission asked if anyone else had any other evidence to present. When no one came forward, the public portion of the hearing concluded, and the commissioners discussed the discrepancies between the NTH report and the Bolt report concerning the existence of a continuous layer of clay, based on different well logs. The planning commission decided to have the township retain a neutral third party to reconcile the differences between the two reports.

On November 9, 2000, the planning commission held another hearing. Ron Jona, one of the property owners, began by giving a detailed description of the gas station plan. Jona indicated that even though double-walled underground storage tanks were standard practice, defendant procured triple-walled underground storage tanks at the planning commission's request. Notably, out of the tens of thousands of tanks it sold nationwide, the company from which defendant purchased its tanks had only sold twenty-six triple-walled tanks.

Zora Johnson, the water authority's attorney, requested that she be allowed to summarize the water authority's position because new planning commission members were present. Johnson also requested that planning commission members be allowed to direct any questions directly to the water authority or its environmental consultant. However, the chairman of the planning commission denied the request, stating that a public hearing had already occurred, and that "the normal process would not be to have a briefing every time there [are] new personnel."

David Jones, a field specialist for RW Mercer Company, explained that 7-Eleven contracted his company to ensure that all of the underground storage tanks would be properly installed and correctly operated and maintained. Jones stated that his company conducted inspections every ninety days, if not more frequently, to test sensors to make sure they were working properly, and to monitor containment areas for fluids. Jones explained that triple-wall underground storage tanks would be used at the 7-Eleven site, and that they would be monitored in three ways: first, the gasoline would be monitored with a probing system which is connected to a computerized tank monitor inside the store; second, the second wall of the tank would be monitored with a sensory device designed to detect any liquid entering that area; and third, the

exterior wall of the tank would be monitored with another sensory device designed to detect any liquid coming into contact with it.

Jones explained that double-wall piping connects the tanks to the dispensers, so that any leak in the main line would be contained by the secondary wall and delivered to a containment area that is monitored by a sensor for the presence of gasoline. The distribution pipes are also pressurized, allowing for a secondary monitor. Jones explained that pan sensors underneath the pumps would contain any surface spills from customers fueling their vehicles. If someone were to drive into a pump and knock it over, a shear valve would get cut in two and stop the flow, sending the gasoline back to the containment area. If someone were to drive away with a dispenser in their vehicle, the "swivel with a two-way breakaway" would separate and contain the gasoline in the hose as well as the nozzle.

Jones explained that the electronic equipment in the store would also monitor the levels of fuel in a vehicle's gas tank, and would shut off when the fuel level reaches ninety percent. The computer system would also monitor gallons sold as well as deliveries, and reconcile the activity on a daily basis, so that the precise amount of gasoline in the underground storage tanks would be ascertainable at all times. Further, an all-stop system on the cash registers could shut off fueling if a hose breaks and the breakaway system fails. Further still, an all-stop emergency button on the wall could shut down every piece of equipment on the lot.

Green Oak Township's engineer, James Wilson, reported that he had not contacted a neutral third party to reconcile the differences between the NTH report and the Bolt report, because the DEQ had informed him that information concerning the hydrogeology of the site indicated there would be no impact on the water authority's existing wells or future proposed wells. T. Eftaxiadis, a hydrogeologist with NTH, attempted to reconcile the two conflicting reports that had been presented to the planning commission. The NTH report suggested the presence of clay, whereas the Bolt report suggested the absence of clay. Eftaxiadis explained that of the fifty-seven well logs in the area, all except four indicated the presence of clay. Eftaxiadis explained that well logs may not be used conclusively for developing interpretations of soil, and that because well logs are not sufficiently reliable, NTH performed five additional borings at the gas station site, all of which showed the presence of a continuous layer of clay. Based on Eftaxiadis' information and Wilson's report of the DEQ opinion, the planning commission was satisfied that it had all the relevant information necessary to make a decision regarding the hydrogeology of the site, and that a third-party review of the conflicting reports would be unnecessary.

Eftaxiadis also explained that Bolt's contamination model was based on the faulty assumption that any contamination would instantly enter the aquifer and travel toward the water authority's wells. However, in reality, any contamination at the gas station would have to travel through the pavement and concrete pad, then migrate through the sand and clay, before reaching the aquifer. Eftaxiadis explained that Bolt failed to consider details that would impact calculations on the transport-migration times for contaminants, and that such details could only be determined by geotechnical borings, which Bolt had not done.

Pat Cook, a district engineer for the drinking water and radiological protection division of the DEQ, stated that his job was to provide oversight for public water systems throughout the state. Cook explained that his division deals with the operation, construction, and maintenance

of water supplies. Cook explained that pursuant to DEQ rules, a new well can be located no closer than 200 feet from a standard isolation area or 2,000 feet from a major source of contamination. Cook specifically stated that double-walled underground storage tanks are not considered a major source of contamination. Further, Cook stated numerous times that the water authority's ability to install a new well would be unaffected by the gas station. For example:

> *Q.* [Chairman of the planning commission] Is there anything in the siting of this particular service station that would prevent [the water authority] from placing a . . . new well on their property?
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> *A.* [Cook] No. . . . That gas station there is not going to have any impact on the way you deal with [the water authority], regardless if they want to drill a new well there or not . . . .

When pressed about the potential for contamination, Cook stated that the gas station was a minimal risk, and that "we can't draw a 2,000-foot circle around every well in the state and say 'no development.'"

Ben Hall, the district supervisor for the storage tank division of the DEQ, stated that he oversees a staff of underground storage tank inspectors, who inspect the site before development; follow the installation process; and inspect each integral part of the tank, tank system, and design. Hall explained that all that would normally be required for a gas station such as the one here is a double-walled storage tank, and that these are the first triple-walled storage tanks to be used in Michigan.

Andrea Zajac, chief of the technical engineering unit of the DEQ, explained that her department reviews all underground gasoline systems that are installed in the state, including the parts and materials, such as tanks, piping, release detentions, sensors, backfill, and nozzles, to ensure that all parts are compatible. Further, her department ensures that the location of underground storage tanks is compatible with any nearby water wells. For example, if an underground storage tank is in a delineated wellhead protection area, it must be double-walled. She also confirmed that these were the first triple-walled storage tanks to be used in Michigan.

Following the statements given by the DEQ representatives, the water authority's counsel reiterated her request "that representatives be allowed to ask questions of the individuals." The chairman of the planning commission denied her request:

> Just for education for those in the audience, any time there's a special use, there's a public hearing. At that time, folks have an opportunity to speak. The public hearing was done on this particular proposal, an administrative hearing was done, and [the water authority] was not allowed—or did not get notice, a proper notice. A court order required us to conduct a public hearing; we conducted that public hearing.
>
> Consistently, since I've been chair, and prior to that, any time there's a public hearing, people are allowed to speak. At the next meeting, there is not a[n] additional public hearing. At that time, the commission, those folks at the

> commission, made a request to appear, and the applicant discussed the matter at hand.
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> So to not allow people to speak this evening after the public—call to the public, and because this is not a public hearing, is not inconsistent with the administration of the commission. I don't want anyone to feel that we are not allowing folks to speak. We have a business at hand; there was a process; there [are] rules; we followed th[o]se rules. We've allowed some flexibility for certain people to provide a particular input on a question, but I think there's been some flexibility demonstrated.
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> There was also a call to the public at the end; there was a call to the public at the beginning. No one chose to speak. Having said that, the item is now back to the table, to the commissioners.

At a following meeting on November 30, 2000, the planning commission made a call to the public on the permit, and numerous people voiced their concerns about the proposed gas station. The chairman of the planning commission discussed the application process and the water authority's appeal to the circuit court, and engaged in a detailed review of all of the requirements set out by the planning commission and met by the property owners. Following a lengthy discussion, the planning commission again voted to grant a special use permit to the property owners.

The water authority again appealed the planning commission's grant of a special use permit to the property owners, arguing that the planning commission's decision was contrary to law and was not supported by competent, material, and substantial evidence. The water authority also moved for a stay pending appeal, prohibiting the continued construction of the 7-Eleven gas station and convenience store. However, the circuit court denied the water authority's motion, finding that injunctive relief was unavailable to prevent speculative harm.

On April 30, 2003, the circuit court issued an opinion and order again reversing the planning commission's grant of a special use permit to the property owners. The circuit court found:

> The procedure followed by the Planning Commission at the November hearings, cause this Court to conclude that the [water authority] w[as] denied the right to be heard, the right to present and rebut evidence, the right to an impartial tribunal, and the right to a record and findings made. These are the basic requisites to a valid administrative hearing. . . . There is ample evidence that the [water authority] w[as] denied the right to be heard and the right to present and rebut evidence. Furthermore, evidence indicates that the Planning Commission was not impartial.
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> [The water authority] was denied its procedural due process rights. There was no fair and equal opportunity to be heard. The record supports a conclusion that the Planning Commission was not acting in the required capacity of an impartial

> decision maker. The Planning Commission has acknowledged that it based its decision upon the evidence presented at the November meetings. [The water authority] was not given the opportunity to challenge any of this evidence. This Court therefore concludes that the Planning Commission decision was not "authorized by law" or "based upon proper procedure" because it failed to provide [the water authority] with adequate procedural due process. [The water authority] was not given a meaningful opportunity to challenge the new evidence presented by MDEQ, [the property owners] and the other proponents of the process. For this reason, the November 30, 2000 decision granting the special approval use permit is reversed.

The circuit court also ordered that "the operation of the facility which required this approval should forthwith cease and desist."

II. Analysis

A. The Circuit Court Erred in Reversing the Planning Commission's Grant of a Special Use Permit

The planning commission's decision is a final administrative decision subject to review by the circuit court pursuant to Const 1963, art 6, § 28. *Silver Creek Twp v Corso*, 246 Mich App 94, 98; 631 NW2d 346 (2001).[1] We "review[] a lower court's review of an agency decision to determine 'whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.'" *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (2002), quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

Const 1963, art 6, § 28 provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same

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[1] The water authority concedes that it had no right of appeal to the zoning board of appeals, and that the planning commission's decision was final and appealable to the circuit court as of right, but nonetheless asserts that the statutorily prescribed provisions for judicial appeal set out in MCL 125.293a apply in the instant case. However, because the township's zoning ordinance lacks a provision for appeal of the planning commission's decision to the township zoning board of appeals, MCL 125.293a is inapplicable, and the planning commission's decision is subject to appellate review under Const 1963, art 6, § 28. *Silver Creek*, *supra* at 98; *Carleton v Sportsman's Club v Exeter Twp*, 217 Mich App 195, 199-201; 550 NW2d 867 (1996).

> are supported by competent, material and substantial evidence on the whole record.

Therefore, the proper standard of review to be applied by the circuit court was whether the planning commission's decision was *authorized by law* and the findings were *supported by competent, material, and substantial evidence on the whole record*.

Whether a decision was "authorized by law" under the constitutional standard has been interpreted by this Court to mean "allowed, permitted, or empowered by law." *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998); see Le Duc, Michigan Administrative Law, § 9:05, pp 608-609. An agency decision that is in violation of a statute or the constitution, is in excess of the statutory authority or jurisdiction of the agency, is made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious is a decision that is not authorized by law. *Northwestern Nat'l Cas*, *supra* at 488.

Here, the circuit court determined that the planning commission's decision was not "authorized by law" or "based upon proper procedure," because the planning commission violated the constitution by depriving the water authority of its right to procedural due process. However, we reverse the circuit court's decision, because the circuit court misapplied the correct legal principles in coming to that conclusion.

"The federal and Michigan constitutions guarantee that the state cannot deny people 'life, liberty, or property without due process of law.'" *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999), quoting US Const, Am V; Const 1963, art 1, § 17. "At its most basic level, procedural due process requires fairness." *Kentwood v Sommerdyke Estate*, 458 Mich 642, 696; 581 NW2d 670 (1998) (Weaver, J., dissenting). "Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property." *Kampf*, *supra* at 382.

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Id*. Our Supreme Court has explained:

> The critical element provided by . . . an administrative hearing is the opportunity for a party to present arguments and evidence in support of its position before a decision is rendered, the chance to respond before final action is taken. Notice and hearing are the means by which we guarantee that a party, knowing the consequences of a proposed action, has a forum in which to present its position in a meaningful way. [*Westland Convalescent Ctr v Blue Cross & Blue Shield of Michigan*, 414 Mich 247, 268; 324 NW2d 851 (1982).]

Our Supreme Court has also noted that the procedural due process protections set out in Const 1963, art 6, § 28, which are applicable in the instant case, "provide[] the *minimum* standard of review for appeals from quasi-judicial final decisions, findings, rulings, and orders that affect private rights." *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 269; 566 NW2d 514 (1997).

A careful review of the record does not support the circuit court's ruling that the water authority was denied procedural due process. With regard to the November 9, 2000 hearing, the second hearing following the circuit court's initial remand, the circuit court made the following findings:

> [Water authority] representatives attended the November 9, 2000 meeting, and, at the Planning Commission's request, Pat Cook from the MDEQ Drinking Water Division and Ben Hall and Andrea Zajac from the MDEQ Storage Tank Division also were present. Planning Commission Chairman Richard Rule opened the meeting by stating that he wanted to have an "open dialogue with those present at the table from 7-11 and the development, as well as those from the DEQ."
>
> [The water authority] notes that [property owner] representatives spent a significant amount of time presenting additional information concerning the hydro-geology at the site, as well as certain proposed modifications to the development itself. Further that there were lengthy presentations by Ron Jona, of Ron Jona & Associates; David Jones, a field specialist from the RW Mercer Corporation; and T. Eftaxiadis from NTH Consulting. The MDEQ representatives then fielded questions from both the Planning Commission and the representatives of [the property owners] regarding the proposed development.
>
> During the November 9, 2000 hearing, [the water authority's] attorney twice requested an opportunity to address the Planning Commission. Specifically, [the water authority's] attorney asked that [water authority] representatives be allowed to present information to the new Planning Commission members who had not been present during the October 12, 2000 hearing; to address questions from the Planning Commission; and to ask questions directly of the MDEQ representatives. Both requests were refused. Another hearing on the issue was scheduled for November 30, 2000.

While the circuit court accurately characterized the information conveyed to the planning commission by the property owners, their consultants, and MDEQ representatives, it mischaracterized the planning commission's denial of the requests made by the water authority's attorney in that it did not detail the planning commission's explanation for denying those requests.

Regarding the request that water authority representatives be allowed to present information to new planning commission members and that planning commission members be allowed to ask questions directly to the water authority or its consultant, the chairman of the planning commission stated that the public hearing had already occurred on October 12, 2000, and that it was not "the normal process . . . to have a briefing every time there [are] new personnel." The record supports that assertion and also shows that the water authority was allowed to present its position and evidence in support of it at the October 12, 2000 meeting.

Regarding the request "that [water authority] representatives be allowed to ask questions of the individuals," presumably the MDEQ representatives, the chairman of the planning commission explained that the public hearing on the matter already occurred, and the instant meeting was not "an additional public hearing." The chairman noted his concern that he did not

"want anyone to feel that we are not allowing folks to speak," and commented that the planning commission "allowed some flexibility for certain people to provide a particular input on a question," but stated that "no one chose to speak" during the call to the public at the beginning or at the end of the meeting. The chairman reiterated that because the instant hearing was not a public hearing, "to not allow people to speak this evening after the . . . call to the public . . . is not inconsistent with the administration of the commission."

Admittedly, the property owners, as the permit applicants, and the DEQ representatives, as neutral experts, were afforded a greater opportunity to present their case, Nonetheless, the circuit court's determination that the planning commission's denial of the requests made by the water authority's counsel amounted to a denial of procedural due process is unfounded. The record clearly reveals that the water authority had an "opportunity to be heard in a meaningful time and manner," i.e., it had "the chance to know and respond to the evidence." *Cummings, supra* at 253.

With regard to the November 30, 2003 hearing, the circuit court made the following findings:

> At the November 30 meeting, the Planning Commission recognized the unresolved conflict between the expert reports concerning the hydrogeology at the site. One of the developers[']' representatives even agreed with [the water authority] that potential contamination is foreseeable: "Once the contamination gets into the groundwater, the clay layers are going to slow down the migration. Eventually, depending on the quantity of the spill, they will find a way around the clay." Although the Planning Commission recognized the need to have an independent third party review the materials and make a recommendation, it never did so.
>
> At that hearing, those opposing the development, including [water authority] representatives and Brighton and Green Oak Township residents dependent on the [water authority] system for their water supply, were limited to a one-minute presentation during the call to the public. [The property owners] then w[ere] allowed to make another lengthy presentation to the Planning Commission.

Again, the circuit court mischaracterized the occurrences of the planning commission meeting. First, it is important to note that the planning commission resolved the issue of whether to have a neutral third party reconcile the conflicting Bolt and NTH reports, a fact overlooked by the circuit court. At the November 9, 2000 meeting, the township's engineer reported to the planning commission that he had not contacted a neutral third party as previously discussed because of new information he had received from the DEQ. In addition, after hearing hydrogeologist Eftaxiadis' explanation of the conflicting reports, the planning commission was satisfied that it had all the relevant information necessary to make a decision regarding the hydrogeology of the site, and that a third-party review would be unnecessary. The planning commission's determination that it had wrongly concluded it would need a third party to reconcile the conflicting reports did not constitute a denial of procedural due process.

With regard to the planning commission's alleged one-minute speaking limitation during the call to the public, the record reveals that although the planning commission requested

speakers to limit their comments to one minute, all of the numerous speakers were allowed to speak for as long as they wanted.

We agree with the property owners that *Brody v City of Mason*, 250 F3d 432 (CA 6, 2001) supports our conclusion that the water authority received the procedural due process to which it was entitled. In that case, the planning commission granted, and the city council affirmed, a special use permit allowing a property owner to operate a beauty salon in a residential neighborhood and pave the rear yard for parking. *Id*. at 433-435. The plaintiffs were neighboring property owners claiming they suffered damage caused by water runoff from the parking lot pavement. *Id*. at 433.

In *Brody*, as in this case, when the property owner applied for a special use permit, the planning commission discussed the application at a public meeting. *Id*. at 434. One of the plaintiffs appeared at the public meeting and voiced several concerns. *Id*. After deciding that it needed additional information before it could resolve the application, the planning commission voted to table the decision until the following meeting, and stated that public comment on the application was closed; however, the public was invited to submit additional written information in the interim. *Id*.

At the planning commission's next meeting, it voted to grant a special use permit to the property owner. *Id*. Although one of the plaintiffs was present, the planning commission did not allow him to speak, stating that public comment on the application had been closed after the initial meeting. *Id*. However, the planning commission allowed the plaintiff to submit the notes he had prepared in anticipation of speaking at the meeting. *Id*. On appeal to the city council, a public meeting was held following a regular meeting. *Id*. While the agenda had been publicly noticed by posting, personal notice was not sent to the plaintiffs or other neighboring property owners. *Id*. As a result, the plaintiffs were not present at the meeting. *Id*. However, the property owner attended and was allowed to address the city council. *Id*. at 434-435. The city council voted to affirm the planning commission's grant of a special use permit, and a letter announcing the decision was sent to one of the plaintiffs. *Id*. at 435. The plaintiffs attended a subsequent city council meeting, and were allowed to speak, contesting the city council's decision. *Id*. They were informed that their only recourse was to appeal to court. *Id*.

The Court of Appeals for the Sixth Circuit summarized the plaintiffs' procedural due process argument: "that they were denied a *meaningful* hearing and *meaningful* notice, that there was favoritism shown to [the property owner], and that there was a plan designed to impair their opportunity to seek legal redress." *Id*. at 436. The Court noted that "'[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'" *Id*. at 437, quoting *Boddie v Connecticut*, 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 (1971). The Court noted that "in the context of administrative zoning decisions," it had held that "the process must provide sufficient notice to affected landowners and an opportunity to be heard in opposition." *Brody*, *supra* at 437.

The Court concluded that "[a]lthough plaintiffs dispute the overall conclusion that the City reached, the evidence in the record indicates that conclusion was the result of an impartial inquiry which satisfies the requirements of due process," and that "[b]eyond their bald assertions, plaintiffs have not demonstrated that any of the actions by the Planning Commission . . . w[ere]

the result of favoritism or special treatment." *Id*. at 437-438. Further, the Court noted that "[e]ven if [the property owner's] position was favored by the City, it does not establish improper bias." *Id*. at 438. The Court held that "[g]iven that plaintiffs were allowed to participate in the special use permit decision process, and that the City sufficiently considered evidence and facts pertaining to the surrounding land before approving the special use permit . . . the district court did not err in finding that plaintiffs' procedural . . . due process rights were not violated." *Id*.

Similarly, in this case, the water authority received the procedural due process to which it was entitled: although the water authority did not fully participate at every stage of the property owners' application process, it is undisputed that it was allowed to comment on the property owners' application for a special use permit at the numerous planning commission meetings. The water authority was given notice and an opportunity to be heard in the property owners' application process for a special use permit. The planning commission considered evidence and facts proffered by the water authority and the property owners before making the decision to grant a special use permit. Therefore, the water authority was not denied procedural due process.

In its determination that the water authority was denied procedural due process, the circuit court focused on the events of the November 9, 2000, and November 30, 2000 hearings. Instead, it should have focused on the first hearing following remand, the October 12, 2000 public hearing, at which the planning commission had been ordered to ensure that the water authority had adequate notice and an opportunity to be heard, including an opportunity to present evidence before a final decision was issued. At the October 12, 2000 public hearing, the water authority's counsel informed the planning commission of the water authority's concerns regarding the proximity of the proposed gas station to its DEQ-approved wellhead delineation area. The water authority's consultant addressed the planning commission, and offered his opinion of the propriety of the report prepared by the property owners' consultant. The water authority's consultant also explained his contamination model. Further, numerous representatives of the water authority voiced their concerns about the proposed gas station. Importantly, before the hearing concluded, the chairman of the planning commission asked if anyone else had any other evidence to present, and no one came forward.

The subsequent hearings on November 9, 2000, and November 30, 2000, consisted primarily of clarification requested by the planning commission. Those hearings were not "public hearings" as such, and the water authority was provided with an opportunity to be heard at the October 12, 2000 hearing. Procedural due process, especially the rudimentary type provided in administrative hearings, consists of notice and an opportunity to be heard, not an opportunity to rebut all conflicting information. See *Brody*, *supra* at 437.

Here, although the water authority did not receive proper notice of the initial public hearing on the matter, its representatives were present and allowed to comment to some degree at all five subsequent hearings. The water authority was allowed to present witnesses on its behalf and submit material in support of its position to the planning commission. The water authority was given the opportunity to participate in the administrative process before the planning commission made a final decision, including directly communicating its views in a timely, efficient manner. Due process of law, appropriate to the nature of the case and consistent with the constitutional requirements, was afforded. The planning commission's grant of a special use permit was authorized by law, and we reverse the circuit court's finding to the contrary.

B. The Planning Commission's Grant of a Special Use Permit
Did Not Violate Rules Promulgated Under the Safe Drinking Water Act
or Underground Storage Tank Regulations

The circuit court did not address the water authority's argument that the planning commission's grant of a special use permit violated rules promulgated under the safe drinking water act and the underground storage tank statute; therefore, the issue is not properly before us. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). However, we will review this unpreserved claim because consideration of this issue is "necessary to a proper determination of the case." *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 195; 412 NW2d 690 (1987).

Whether a party has standing to bring an action presents a question of law that is reviewed de novo. *Franklin Historic Dist Study Comm v Village of Franklin*, 241 Mich App 184, 187; 614 NW2d 703 (2000). Similarly, statutory interpretation is a question of law that is reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

MCL 325.1002, concerning proceedings brought to enforce the safe drinking water act, provides in pertinent part:

> At the request of the department [of environmental quality or its authorized agent or representative], the attorney general may bring an injunctive action or other appropriate action in the name of the people of the state *to enforce* this act, *rules promulgated under this act*, or an order issued pursuant to this act or the rules. [Emphasis added.]

MCL 324.21108(1) provides in pertinent part: "[t]he department [of natural resources, underground storage tank division] shall enforce this part and the rules promulgated under this part." A review of the plain language of the statutes reveals that the water authority did not have standing to allege violations of rules promulgated under the safe drinking water act or the underground storage tank statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). We need not substantively address the propriety of the violations alleged by the water authority in the circuit court, nor remand the matter to the circuit court for a determination, as requested on appeal by the water authority.[2]

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[2] In any event, we note that representatives of the DEQ specifically stated that installation of the underground storage tanks would not violate the rule promulgated under the safe drinking water act about which the water authority complains. That is, even though wells serving public water supplies such as the one at issue in this case must be located a minimum distance of 2,000 feet from known major sources of contamination, triple wall storage tanks such as the type used by the property owners are not considered a major source of contamination.

Further, installation of the underground storage tanks did not violate the rules promulgated under the underground storage tank regulations about which the water authority complains. Pursuant to
(continued…)

C. The Planning Commission's Decision was Based on
Competent, Material, and Substantial Evidence on the Whole Record

Because the circuit court reversed the planning commission's grant of a special use permit to the property owners on the basis that the water authority was denied procedural due process, it did not address whether the planning commission's decision was supported by competent, material, and substantial evidence on the whole record; therefore, the issue is unpreserved for appeal. *Brown*, *supra* at 599. However, in the interest of judicial economy and in light of the fact that the property owners' permit application was filed more than six years ago, we will review this unpreserved claim because consideration of the issue is "necessary to a proper determination of the case." *Providence Hosp*, *supra* at 195.

Our Supreme Court has held that findings of fact are to be upheld if they are supported by competent, material, and substantial evidence on the whole record. *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 121; 223 NW2d 283 (1974). "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). Strict deference must be given to the planning commission's findings of fact, *THM, Ltd v Comm'r of Ins*, 176 Mich App 772, 776; 440 NW2d 85 (1989), and when there is substantial evidence, the circuit court must not substitute its discretion for that of the planning commission, even if the circuit court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). The circuit court should not "set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (Boyle, J.).

Here, the record reveals that the planning commission's grant of a special use permit to the property owners was supported by competent, material, and substantial evidence on the whole record. The Green Oak Township zoning ordinance provides in pertinent part:

> The Planning Commission shall review the proposed special approval use in terms of the standards stated within this Ordinance and shall establish that such use and the proposed location meet the following standards:

(…continued)

rule 29.2109(d)(3), an underground storage tank system must not be installed without secondary containment unless it is more than 2,000 feet from the type of wells such as the water authority's wells. However, triple wall containment, such as the type proposed by the property owners, may be located within less than 2,000 feet of the water authority's wells. Pursuant to rule 29.2109(d)(5), if the proposed location of an underground storage tank system presents an unacceptable risk of contamination to surface water, wetlands or an aquifer, then the department may require that the underground storage tank system be located or use secondary containment, or both, so as to eliminate or minimize the danger of potential contamination or may disapprove a proposed underground storage tank installation. However, the DEQ specifically determined that the proposed underground storage tank system did not present an unacceptable risk of contamination.

(A) Will be harmonious and in accordance with the general objectives or any specific objectives of the Green Oak Township Master Plan.

(B) Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will not change the essential character of the area.

(C) Will not be hazardous or disturbing to existing or future nearby uses.

(D) Will be an improvement in relation to property in the immediate vicinity and to the Township as a whole.

(E) Will be served adequately by essential public services and facilities or that the persons responsible for the establishment of the proposed use will provide adequately for any such service or facility.

(F) Will not create excessive additional public costs and will not be detrimental to the economic welfare of the Township.

(G) Will be consistent with the intent and purposes of this Ordinance. [Green Oak Township zoning ordinance, section 3.4.3.]

Based on the evidence presented by the property owners and the water authority, there was substantial evidence for the planning commission to conclude that the special use proposed by the property owners would meet the standards set out in the township's zoning ordinance. Specifically, with regard to standard (C), there was "evidence that a reasonable person would accept as sufficient to support a conclusion," *Dowerk*, *supra* at 72, that the underground storage tank system would "not be hazardous or disturbing to existing or future nearby uses," including the water authority's existing and proposed wells. Representatives from the DEQ stated that the underground storage tank systems are not considered a "possible source of contamination," and that the installation of an underground storage tank system would have no effect on the water authority's existing or proposed wells.

Because strict deference must be given to the planning commission's findings of fact, *THM*, *supra* at 772, we find that the planning commission's grant of a special use permit to the property owners was based on competent, material, and substantial evidence on the whole record. *Boyd*, *supra* at 234-235; MCR 7.216(A)(1), (7).

III. Conclusion

The water authority received the procedural due process to which it was entitled, and the circuit court misapplied the law when it determined that the planning commission's grant of a special use permit to the property owners was not authorized by law. The planning commission's decision to grant a special use permit to the property owners was supported by competent, material, and substantial evidence on the whole record. We reverse the circuit

court's determination that the planning commission denied the water authority procedural due process, vacate the "cease and desist" injunction, and reinstate the planning commission's grant of a special use permit to the property owners.[3]

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

[3] In light of our determination that the water authority received the procedural due process to which it was entitled and that the planning commission's grant of a special use permit was proper, any error in the circuit court's failure to remand the matter to the planning commission is moot, as is any error in the circuit court's order to "cease and desist" operation of the gas station. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights," and "[a]s a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).